



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 6, 2005

Mr. Michael P. Mondville
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2005-02946

Dear Mr. Mondville:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 221337.

The Texas Department of Criminal Justice (the "department") received a request for information relating to a job posting for an assistant regional director position, including the interview schedule; pages 1 and 2 of the certifications of compliance and interview documentation forms for two named individuals; interview notes for those two individuals; the rationale for the selection of one of the individuals; and that individual's employment application. You have submitted responsive information that you claim is excepted from disclosure under sections 552.117, 552.122, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We assume that you have released any other information that is responsive to this request, to the extent that such information existed when the department received the request. If not, then any such information must be released at this time.¹ The Act does not require the department to release information that did not exist when it received this request or to create responsive information.²

¹See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

²See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Initially, we address the submitted information that you seek to withhold under section 552.117 of the Government Code. In Open Records Letter No. 2005-01067 (2005), we issued a previous determination that authorizes the department to withhold the present and former home address and telephone number, social security number, and family member information of a current or former employee of the department under section 552.117(a)(3) without the necessity of again requesting an attorney general decision with regard to the applicability of this exception. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (delineating elements of second type of previous determination under Gov't Code § 552.301(a)). We have marked the information that you must withhold under section 552.117(a)(3) in accordance with Open Records Letter No. 2005-01067. Although you do not indicate whether the requestor is an employee of the department, we note that the requestor has a right of access to information that would be excepted from public disclosure under section 552.117(a)(3). *See* Gov't Code § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).³ Thus, the requestor's social security number may not be withheld from him under section 552.117(a)(3).⁴

Next, we address section 552.122. This section excepts from public disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); Open Records Decision No. 626 at 8 (1994).

Having considered your arguments and reviewed the information that you seek to withhold under section 552.122, we find that interview questions one, two, and three qualify as test

³Section 552.023 provides in part that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a).

⁴We note that the social security number of an individual who is not an employee of the department may be excepted from public disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the Social Security Act. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I); Open Records Decision No. 622 at 2-4 (1994). However, the requestor's social security number may not be withheld from him under the federal law, which also is privacy-based. Should you receive another request for the submitted information from a person who would not have a right of access to the requestor's private information, the department should resubmit this same information and request another decision. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 673 (2001) (previous determinations).

items under section 552.122(b). We also find that the release of the preferred and actual responses to those questions might reveal the questions themselves. We therefore conclude that the department may withhold interview questions one, two, and three and the preferred and actual responses to those three questions under section 552.122. As we conclude that the remaining interview questions do not qualify as test items under section 552.122(b), the department may not withhold any of the remaining questions or responses under this exception.

Section 552.130 excepts from disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). The Texas driver's license information that we have marked must be withheld under section 552.130.

In summary: (1) the marked employee information must be withheld under the previous determination issued to the department in Open Records Letter No. 2005-01067; (2) the department may withhold interview questions one, two, and three and the preferred and actual responses to those three questions under section 552.122; and (3) the Texas driver's license information must be withheld under section 552.130. The rest of the submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

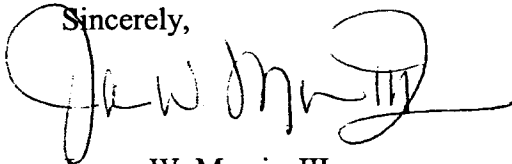
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J W Morris III', with a stylized flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 221337

Enc: Submitted documents

c: Mr. Richard Pena
7408 North 19th Street
McAllen, Texas 78504
(w/o enclosures)